No. 3629

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HERTA MARLOW,

Appellant,

vs.

CHARLES PAGANINI, as administrator of the estate of David K. Marlow, deceased,

Appellee.

APPELLEE'S REPLY TO APPELLANT'S PETITION FOR A REHEARING.

WALTON C. WEBB,
C. F. REINDOLLAR,
Solicitors for Appellee.

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Appellant divides her petition for a rehearing in this case into two points, but in reality there is only one point, designated by appellant as number I, namely, that the opinion of this Court in this case does not give due consideration to the fact that the policy provides that when a change of beneficiary has been made it shall take effect as of the date when the insured signed the written notice of change of beneficiary. The other point, designated in appellant's petition as number II, is merely a criticism of the applicability of the cases cited in the opinion of this Court, which criticism is not justified.

This point of appellant, which is in effect that the provision of the policy in our case, that when a change of beneficiary has been made it shall take effect as of the date when the insured signed the written notice of change of beneficiary, permits the delivery to the company of the notice of change of beneficiary and the policy after the insured's death, was also made by appellant in her brief filed on the hearing of the appeal in this Court and was passed upon adversely by this Court in its opinion in this case, when this Court there held that the provision of the policy as to change of beneficiary providing for the delivery to the company of written notice of the change of beneficiary and the policy, meant delivery by the insured during his lifetime. It was not necessary for this Court to discuss this provision of the policy as to when a change of beneficiary takes effect as it was obvious that there had been no change of beneficiary.

Appellant seems to think that in determining under the policy in our case whether or not a change of beneficiary has taken place the controlling element is, the provision of the policy as to when a change of beneficiary takes effect, namely, the date the notice of change of beneficiary was signed, and that the other provisions of the policy as to how a change of beneficiary may be accomplished have no effect whatsoever. This, of course, cannot be so. As was held by this Court in its opinion in this case the controlling consideration in the matter is, whether the provisions as to the manner in which a

change of beneficiary may be accomplished have been complied with. And this Court also there held, as above pointed out, that the provisions of the policy that the notice of change of beneficiary must be delivered to the company at its Home Office, accompanied with the policy for endorsement of the change, means that these things must be done during the lifetime of the insured.

Under appellant's contention all the insured would have to do during his lifetime would be to sign a notice of change of beneficiary. He would not even have to deliver it to the proposed new beneficiary. But, assuming that appellant means that the notice would have to be so delivered by the insured during his lifetime, yet, under her contention, after his death the notice of change of beneficiary could be forwarded, together with the policy, to the company at its Home Office, and it would have to endorse the change of beneficiary upon the policy, whereupon it would take effect at the date that the insured signed the notice of change of beneficiary. Of course, this is ridiculous. If a change of beneficiary could under the policy be effected in such a manner the insurance company might be liable twice on the same policy, as it might, prior to knowledge that the insured had signed and delivered to the proposed new beneficiary a notice of change of beneficiary, pay the amount of the policy to the original beneficiary and then later on have to pay it over again to the new beneficiary when he presented after the insured's death the notice of change of

beneficiary and the policy for endorsement thereon of the change. This not at all improbable situation shows how utterly fallacious is this contention of appellant.

The provision in the policy in our case that the change of beneficiary when endorsed on the policy shall take effect as of the date when the insured signed the notice of change of beneficiary merely fixes the time when a change of beneficiary, made in accordance with the terms of the policy, takes effect, and does not specify the requisites necessary to accomplish a change of beneficiary. And this Court was correct in its opinion in this case in holding that, as the insured had not delivered to the insurance company during his lifetime the notice of change of beneficiary and the policy, no change of beneficiary had taken place. And it was, therefore, absolutely unnecessary for this Court, as above stated, to discuss in its opinion the provision of the policy as to the time of the taking effect of a change of beneficiary.

Appellant states that the cases cited by this Court in its opinion in this case, which cases were also cited by us in our brief, are not applicable to our case because in each of those cases there was a clear failure on the part of the insured to comply with some condition prescribed for a change of beneficiary. But that is exactly why these cases are applicable to our case. As above pointed out, the policy provides in effect that in order to change the beneficiary the insured must deliver to the company

at its Home Office during his lifetime a written notice of change of beneficiary and the policy for endorsement of the change thereon by the company. It is undisputed that the insured failed to do these things, and, therefore, the cases cited in the opinion of this Court are, as we said before, exactly in point, as they hold that where the insured is to do certain things in regard to a change of beneficiary and fails to do them the change is ineffective.

Appellant, in criticising these cases, states that the case of French against Provident Savings Life Assurance Society, 91 N. E. 577, seems to be an erroneous citation. We do not know exactly what appellant means by this, but if she means that the case is not found in the above report at the above page then she is mistaken. Appellant also says that in the case of De Silva against Supreme Council the Court held that a provision in the will of the insured was inoperative as a change of beneficiary, "but that a written declaration of change of beneficiary left among the papers of the insured would have been an effectual mode of exercising the right to change the beneficiary". The Court did hold that an attempted change of beneficiary by will was inoperative, but did not use the language above quoted or even mention or intimate anything to that effect.

It is respectfully submitted that the petition of appellant for a rehearing of this case should be denied.

Dated, San Francisco,
February 8, 1922.

Walton C. Webb,
C. F. Reindollar,